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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SOFT DRINK WORKERS, LOCAL 812, *etc. et al.*,
Petitioners,

v.

MONARCH LONG BEACH CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Section 303 of the Labor Management Relations Act of 1947 affords a civil action for damages caused by an unfair labor practice committed in violation of § 8(b)(4) of the National Labor Relations Act of 1935 as amended by the LMRA. The question presented by this case is whether under the principles established in *DelCostello v. Teamsters*, 462 U.S. 151, the six-month period specified in § 10(b) of the NLRA should govern in § 303 suits.*

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* In addition to the parties identified on the cover, David Levinger and Anthony Vinci, as President and Secretary-Treasurer of Soft Drink Workers Local 812, etc., respectively, were also parties in the court below and are also petitioners herein.

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SOFT DRINK WORKERS, LOCAL 812, *etc., et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Soft Drink Workers, Local 812, *etc., et al.*, defendants-appellees in the courts below, hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that court's decision and judgment in *Monarch Long Beach Corp. v. Soft Drink Workers*, 762 F.2d 228 (C.A. 2 No. 84-7866, 1985), insofar as that decision and judgment reinstates count I of respondent Monarch's complaint in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 762 F.2d 228 and is reproduced in the Appendix to this Petition for a Writ of Certiorari ("App.") at pp. 1a-8a. The opinion of the United States District Court for the Eastern District of New York is reported at 593 F.Supp. 384 and is reproduced at App. 9a-12a.

JURISDICTION

The decision of the court of appeals was rendered on May 20, 1985. On July 31, 1985, Justice Marshall signed an order extending the time for filing this petition to and including September 17, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 187(b).

STATUTES INVOLVED

This case involves §§ 8(b)(4) and 10(b) of the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136 ("LMRA"), and the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 ("LMRDA"), and also involves § 303 of the LMRA, as amended by the LMRDA. These provisions are reproduced in pertinent part at App. 15a-17a.

STATEMENT OF THE CASE

This case arises out of the activity of Soft Drink Workers, Local 812 ("Local 812") in picketing and handbilling Monarch Long Beach Corp. ("Monarch") from March 27, 1978 until August 25, 1978. App. 2a-3a. The object of Local 812's activity was to urge Monarch's customers to buy locally produced soft drinks. App. 2a.

On April 7, 1982, Monarch filed unfair labor practice charges against Local 812 with the National Labor Relations Board ("NLRB" or "the Board"). App. 2a. The NLRB found that Local 812 had violated § 8(b)(4)(ii)(B), of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(ii)(B), by its activity urging Monarch's customers to buy locally produced soft drinks, *Soft Drink Workers Union Local 812*, 243 NLRB 801 (1979), and the NLRB's decision was enforced by the United States Court of Appeals for the District of Co-

lumbia Circuit in a 2-1 decision, *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252 (1980).[1]

On August 25, 1981, exactly three years after the picketing had ended, Monarch filed the complaint in this case. App. 3a. Count I of the complaint alleged that by engaging in this picketing, Local 812 had violated LMRA § 303, 29 U.S.C. § 187. App. 1a. Count II of the complaint alleged that the picketing violated New York's common law regarding embargoes. App. 2a.

The district court held that, under this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151, the appropriate statute of limitations to be applied in an action filed under LMRA § 303, is that contained in NLRA § 10(b), 29 U.S.C. § 160(b). App. 11a. Since § 10(b) provides a six month limitations period, and Monarch's action was filed three years after Local 812 had ceased picketing, the district court dismissed count I of the complaint, which alleged a vioaltion of § 303, as time-barred. App. 11a. The district court also dismissed the other count of the complaint, ruling that Monarch's state law claim is preempted by federal law. App. 11a.

Monarch appealed the district court's dismissal of its complaint, and the court of appeals reinstated count I of the complaint. The court of appeals ruled that the limitations period to be applied in an action under LMRA § 303 should be borrowed from the most analogous state law and that "[t]he most suitable state law analogue [to a suit under LMRA § 303] . . . is New York's cause of action for damages to one's business caused by actions in restraint of trade, N.Y. Gen. Bus. Law § 340 (Mc-

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[1] While this unfair labor practice case was pending before the NLRB, the Board sought an injunction against Local 812 pursuant to § 10(*l*), 29 U.S.C. § 160(*l*). The NLRB's petition for a § 10(*l*) injunction was denied by the United States District Court for the Eastern District of New York on May 30, 1978. App. 2a-3a.

Kinney 1968 & Supp. 1984), which has a four year statute of limitations." App. 7a. Since Monarch filed its complaint three years after the picketing ended, the court of appeals held that count I alleging a § 303 violation is timely under the four-year limitation period borrowed from New York law. The court of appeals agreed with the district court that the pendent state law claim advanced by Monarch in count II of its complaint is preempted by federal law. App. 7a. The court of appeals therefore reversed the district court's dismissal of count I, affirmed its dismissal of count II, and remanded the case for further proceedings. App. 8a.

REASONS FOR GRANTING THE WRIT

The administration of the National Labor Relations Act of 1935 was entrusted solely to the National Labor Relations Board (subject to review by the court of appeals and this Court). On the two occasions during which Congress has amended the NLRA and has further elaborated the national labor policy, the legislature has divided enforcement authority between the Board and the courts. See the Labor Management Relations Act of 1947, 29 U.S.C. §§ 151 *et seq.* and the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 *et seq.* The only statute of limitations in this elaborate complex of provisions—which has proved such a fertile source of federal litigation—is NLRA § 10(b). That provision by its terms requires unfair labor practice charges to be filed with the NLRB within six months of the alleged wrongdoing.

In *DelCostello v. Teamsters*, 462 U.S. 151 (1983) this Court held that the § 10(b) statute of limitations governs hybrid LMRA § 301/duty of fair representation suits in the district courts. The immediate question in this case is whether § 10(b)'s limitation period also governs suits under LMRA § 303 which, as appears on the face of

§ 303, are predicated on the commission of an unfair labor practice in violation of NLRA § 8(b)(4). The Court of Appeals' approach raises as well the broader question whether, as that court appeared to believe, *DelCostello* is to be confined to its immediate context or whether that precedent applies to all labor relations district court litigation in which the federal law embodied in § 10(b) is more suitable than the suggested state law analogies.

Given the extent of federal labor law litigation—and the importance of that litigation in setting the balance between labor and management and in forwarding the paramount interest in industrial peace—the questons presented here as to *DelCostello*'s scope are manifestly important. And, as we now show, the court of appeals' grudging reading of *DelCostello* cannot be squared with this Court's reasoning, with the congressional policy stated in § 10(b), or with four other courts of appeals' understanding of *DelCostello's* teachings.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S *DELCOSTELLO* DECISION.

A. We begin by summarizing the *DelCostello* opinion. At the outset the Court stated the general considerations applicable where Congress has created a federal cause of action but there is no expressly applicable federal statute of limitations.

> In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.
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> * * * *
>
> In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for the en-

> forcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law. [462 U.S. 158, 161.]

The Court then set forth the reasoning which led to the conclusion that the federal time limit stated in § 10(b) is to govern rather than a time limit derived from state law.

1. The Court determined that the closest state law analogies which had been suggested "suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair representation litigation." 462 U.S. at 165. Specifically, the proferred state limitations periods were either too short (three months) or too long (three years). See the discussion *id.* at 165-169. The Court acknowledged that:

> [T]hese objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually "designated to accommodate a balance of interests very similar to that at stake here"—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels. We refer to § 10 (b) of the National Labor Relations Act, which establishes a 6-month period for making charges of unfair labor practices to the NLRB. [462 U.S. at 169, footnotes omitted.]

2. The Court observed that "the NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices," and without passing on the validity of the Board law at its margins stated that "[e]ven if not all breaches of the duty [of fair representation] are unfair labor practices, * * * the family resemblance is undeniable, and indeed there is a substantial overlap." 462 U.S. at 170.

3. The Court also relied on "the close similarity of the considerations relevant to the choice of a limitations period in the two contexts," *i.e.*, in cases to which § 10(b) expressly applies and in hybrid § 301/fair representation cases, *id.* at 170-171, quoting with approval from Justice Stewart's concurrence in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in the case. [462 U.S. at 171.]

B. *DelCostello's* reasoning applies to LMRA § 303 actions at least as forcefully as to LMRA § 301/fair representation actions.

While a breach of the duty of fair representation bears a "family resemblance" to an unfair labor practice, the violation plaintiffs allege in this case *is* an unfair labor practice. Section 303(b), under which this suit is brought, provides a remedy for violations of § 303(a), which in turn expressly incorporates the unfair labor practice set out in full in § 8(b)(4). *See* App. p. 17a, *infra*, quoting § 303.[2] Thus, in the § 8(b)(4)-§ 303 context, § 10(b) is

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[2] Originally the NLRA did not specify any limitations period. The six-month limitation in § 10(b) was adopted as one of the numerous amendments effectuated in 1947 by the LMRA. At the same time Congress created union unfair labor practices, including those defined in § 8(b)(4) and provided the damage remedy of § 303.

As initially enacted § 303(a) spelled out *in haec verba* the various unfair labor practices set forth in § 8(b)(4). When, in 1959, Congress amended § 8(b)(4) and made that unfair labor practice even more detailed, the legislature also revised § 303(a) to incorporate § 8(b)(4) by reference; § 303(b) was left unchanged.

not simply "designed to accommodate a balance of interests very similar to that at stake here", *DelCostello*, 462 U.S. at 169, but is designed to "accommodate the [same] balance of interests . . . [as] that at stake here." And the relatively short six-month period adopted in § 10(b) which applies to all the unfair labor practices created by the NLRA shows that Congress attached the same high value to repose in labor disputes whether the underlying law is stated in one subsection of that Act or another.

In this Court's leading § 10(b) case, *Machinists Local v. Labor Board*, 362 U.S. 411, Justice Harlan wrote:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. . . It may be asserted, without fear of contradiction, that the interests in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure." *Labor Board v. Childs Co.*, 195 F.2d 617, 621-622 (concurring opinion of L. Hand, J.). *Cf. Colgate Co. v. Labor Board*, 338 U.S. 355, 362-363. As expositor of the national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with the past conduct after that period had run, even at the expense of the vindication of statutory rights. [362 U.S. at 428-429.]

Effectuation of the congressional policy embodied in § 10(b) requires that the six-month limitations period govern in LMRA § 303 suits no less than in LMRA § 301/ fair representation suits. In both instances § 10(b) is "an analogy more apt than any of the suggested state law parallels." *DelCostello*, 462 U.S. at 169.

C. In rejecting the argument that § 10(b) applies in § 303 suits, the court of appeals opined that the "policy considerations that influenced the *DelCostello* Court were rooted in the facilitation and protection of 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it' " and that "Section 303 suits simply do not implicate the same concern." (App. p. 6a, *infra*).[3]

The court of appeals read *DelCostello* much too narrowly. The effect on collective bargaining relationships is only one of the factors underlying that decision. It is of far greater importance, we submit, that the state law periods were either too short or too long and that federal law provides a far more appropriate analogy. In this regard the situation here is precisely the same as in *DelCostello*. The four-year state limitations period that the court below applied is even longer that that rejected in *DelCostello*.[4] And because the § 10(b) analogy is exact in this instance—since the § 303 cause of action depends on an unfair labor practice—the failure to apply the § 10(b) six-month limitation period directly and unnecessarily frustrates the Congressional policy of repose which, as we have emphasized, applies to all unfair labor practices, without regard to whether the alleged wrong is committed in a collective bargaining context. *See Machinists*, quoted at p. 8, *supra*.

The court below appears to have been heavily influenced by the caveat in *DelCostello* "that its holding 'should

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[3] The internal quotation is from *DelCostello*, 462 U.S. at 165, quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702.

[4] Other courts, which applied state statutes in § 303 prior to *DelCostello* adopted limitation periods ranging from two years (*Peterson v. Musicians Local 802*, 80 LRRM 2182 (S.D.N.Y.)) to six years (*Hyatt Chalet Motels, Inc. v. Carpenters Local 1065*, 430 F.2d F.2d 1119 (C.A. 9); *Consol. Exp., Inc. v. N.Y. Shipping Ass'n.*, 602 F.2d 494, 506-508 (C.A. 3) vacated and remanded on other issues, 448 U.S. 902).

not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere,' and that it should not be interpreted 'to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy.'" App. p. 6a, *infra*, quoting 462 U.S. at 171. But this caution cannot properly be read as restricting the precedential force of *DelCostello* to hybrid § 301/fair representation suits, even if a federal statute of limitations would be more fitting under *DelCostello's* analytical framework, for, the Court added:

> Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. [462 U.S. at 171-172.]

Even if, contrary to our submission above, the rationale of *DelCostello* is as narrow as the court below would have it, that court's conclusion, which rests on a misunderstanding of § 303, is untenable. While there is, to be sure, no collective bargaining relationship between the parties to the *instant* case, the court below confused the immediate with the necessary.

Many, if not the majority of § 303 suits for violation of the "secondary boycott" prohibition of § 8(b)(4)(B) are brought by a primary employer with whom the defendant union does have a collective bargaining relationship. Such suits may arise whenever a union, in furtherance of a strike for wages or other contract terms, places unlawful economic pressure on persons with whom the struck employer does business. The primary employer ordinarily has a much greater stake in such a dispute than do any of the secondary persons, and experience has shown that primary employers are far more likely than secondary persons to file unfair labor practice charges

with the NLRB and/or to bring suits under § 303 for damages due to the alleged violation.

Moreover, the unfair labor practices prohibited by § 8 (b) (4)—and consequently § 303—are *not* limited to secondary boycotts. Section 8(b) (4) (A) prohibits strikes (and other union conduct) with an object of forcing or requiring any employer or self-employed person to join any other labor organization or to enter into an agreement which is prohibited by § 8(e); § 8(b) (4) (D) prohibits strikes over work assignments. These provisions thus prohibit primary conduct which almost always arises in the context of an existing collective bargaining relationship.[5] Although no precise statistics are available, it is fair to say, at the very least, that in a substantial proportion of suits brought under § 303 the parties are in a collective bargaining relationship, just as in hybrid § 301/ fair representation suits. An employer's overhanging threat to bring such a suit against the bargaining representative is likely to have a serious adverse effect on that relationship.

In short, there is no tenable distinction between *Del-Costello* and this case and the decision below should be reviewed to effectuate compliance with an important precedent in this Court.

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[5] The smallest subclass of cases under § 8(b) (4) arises under § 8(b) (4) (C), which prohibits union strike action to obtain recognition as a representative of employees if another union has been certified as their representative. (We have found no reported § 303 suits involving a § 8(b) (4) (C) violation decided since 1957.) In most § 8(b) (4) (C) cases the striking union is not the representative of any of the struck employer's employees, but there have been such cases in which there was a collective bargaining relationship between the striking union and the struck employer. See *McLeod v. International Longshoremen's Ass'n*, 177 F.Supp. 505 (E.D. N.Y.); *National Maritime Union of America*, 121 NLRB 69.

II. THE DECISION BELOW FRUSTRATES THE INTEREST IN UNIFORM APPLICATION OF NATIONAL LABOR POLICY AND IS INCONSISTENT WITH OTHER APPELLATE DECISIONS APPLYING *DELCOSTELLO*.

The decision below should be reviewed also because that decision frustrates the interests of the national labor policy in a uniform, relatively brief limitations period for the resolution of unfair labor practice claims and because the Second Circuit's exceedingly narrow view of *DelCostello* is inconsistent with the understanding of this Court's teachings by four other courts of appeals.

A. In the court below, Monarch stated:

> It is clear that a uniform limitations period pertaining to § 303 actions is warranted. It is anomalous that limitations periods for § 303 actions have varied between one and twenty years depending upon the jurisdiction where the suit arises. See *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065*, 430 F.2d 1119, 1124-25 (Duniway, J., concurring) (C.A. 9).[6]

We agree with this self-evidently correct point. As Judge Duniway wrote in the *Hyatt Chalet Motels* case:

> It is clear that the purpose was to create federal duties and rights, which are the same in all states and which displace state law at least in cases involving peaceful union activities. *Local 20 Teamsters etc. Union v. Morton*, 1964, 377 U.S 252, 261 . . . It matters not whether the action be filed in a

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[6] Appellant's Brief, C.A. 2 No. 84-7866, p. 21. The absence of uniformity is especially undesirable due to the broad venue provision of § 303(b) which incorporates the venue provisions of § 301. Venue will lie in such a suit in the district in which the defendant union "maintains its principal office" or in which its duly authorized officers or agents are engaged in representing or acting for employee members. See *Denver & R.G.W.R. Co. v. Trainmen*, 387 U.S. 556, 562; *International Union of Op. Eng. v. Metropolitan-Gill-Tecon*, 400 F.2d 261 (C.A. 10).

> federal court or in a state court. What possible reason, then, can there be for having the time within which an action under the statute must be brought vary according to the law of the state in which it is filed? [430 F.2d at 1124.] [7]

The decision below, of course, without providing any answer to Judge Duniway's question, provides just such varying limitations periods for the federal cause of action created by § 303.

B. The holding below that a state statute of limitations should be applied in § 303 suits not only defeats the recognized interest in uniformity, but is inconsistent with the congressional policy favoring a considerably shorter limitations periods than those provided by any arguably analogous state law. See p. 8 *supra*. This point was well made in *International U. of Op. Eng. v. Fischbach and Moore, Inc., supra*, 350 F.2d 936. There the Ninth Circuit, prior to *DelCostello*, while deeming itself bound to follow state law, recognized that:

> There are strong reasons for the application of a six-month period, borrowed from § 10(b) of the LMRA, 29 U.S.C. § 160(b). . . . We think it is nei-

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[7] Monarch did, to be sure, suggest below that the desired uniformity should be achieved by embracing the limitations period described in the Clayton Act, 15 U.S.C. § 15b. Plainly, however, since Congress has, by § 10(b), already prescribed a limitations period with respect to the very unfair labor practices for which § 303 provides a remedy, it is § 10(b) which is most closely analogous. Compare *International U. of Op. Eng. v. Fischbach and Moore, Inc.*, 350 F.2d 936 (C.A. 9), *cert. den.*, 384 U.S. 804:

> The court below mentioned the possible application of the four-year period prescribed in the antitrust statutes. 15 U.S.C. § 15b. 198 F.Supp. at 915. This has been urged by appellees as an alternative ground for upholding the trial court's decision. We believe, however, that no federally prescribed period of limitations can be viewed as so closely analogous as to warrant its adoption into § 303. If we believed ourselves empowered to lift a federally created period from another statute, the period prescribed in Section 10(b), closely related, would be the most appropriate. [350 F.2d at 939, n.3.]

> ther logical, nor just, nor in keeping with the policy which Congress has thus far articulated in the field of labor relations that a six-month period shall limit the filing of a complaint with the Board and that some different period, be it based on laches or a different statute of limitations, shall operate to limit the time for commencing a suit for damages under § 303 based on the same alleged unfair labor practice.
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> Certainly the distinctions between a complaint before the NLRB over an unfair labor practice and a private suit for damages for the same grievances are not so significant as to eliminate the same persuasive considerations of public policy which demanded the quick disposition of labor-management controversy. . . . [350 F.2d at 937-938, citations and quotations from § 10(b) and this Court's decision in *Machinists, supra*, omitted.] [8]

Thus, the decision below multiplies the occasions for federal litigation long after the fact contrary to Congress' judgment as stated in NLRA § 10(b) and to the interest in the sound administration of the dockets of the federal courts.

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[8] The foregoing was cited with approval in *Falsetti v. Local Union No. 2026, United Mine Workers*, 355 F.2d 658, 661, n.13 (C.A. 3), footnote omitted. *Falsetti* did not arise under § 303, but in the text accompanying that footnote the Court made the following presently pertinent observation:

> The District Court, in dismissing appellant's suit, reasoned that in the absence of a federal statute of limitations dealing with the claims for relief appropriate state statutes govern, and thus appellant's suit is barred. There is much authority in support of this viewpoint.
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> It may well be, however, that at least in a case such as this, where the facts were susceptible of triggering National Labor Relations Board action on unfair labor practice grounds, that the state statute of limitations would cause undesirably lingering litigation in light of the six-months federal statute of limitations governing unfair labor practices. [355 F.2d at 661-662.]

C. Finally, the decision below should be reviewed because by sharply circumscribing the scope of this Court's decision, the court of appeals has cast doubt on whether the § 10(b) period is appropriate in any labor law context other than § 301/fair representation cases. The approach of the court below contrasts sharply with that of the decisions of four other circuits which have followed *DelCostello* to apply the six-month statute of limitations to a suit under § 102 of the LMRDA, 29 U.S.C. § 412. *Linder v. Berge*, 739 F.2d 686, 690 (C.A. 1); *Local 1397 Steelworkers v. Steelworkers*, 748 F.2d 180, 182-184 (C.A. 3); *Vallone v. Local 705, Teamsters*, 755 F.2d 520, 521-522 (C.A. 7); *Davis v. UAW*, 765 F.2d 1510, 1512-1515 (C.A. 11).

For example, in the most recent of these cases the Eleventh Circuit observed that where the claim is for violation of a member's right of free speech within the union (as in the case before it), "the national interests in stable labor-management bargaining relationships and the speedy, final resolution of disputes under a collective bargaining agreement are not implicated." *Davis*, *supra*, 765 F.2d at 1514. Even so, that court held that the six-month limitations period of § 10(b) should govern:

> In *DelCostello*, the Supreme Court found a strong connection between the national interest in labor peace and the necessity of a short time period in which to bring an action based on a labor union's duty of fair representation to its members. We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights. We accordingly hold that the six-month limitations period of 29 U.S.C. § 160(b) applies to LMRDA actions brought under 29 U.S.C. § 412 alleging union violation of 29 U.S.C. § 411.

This reasoning concerning the "national interest in labor peace" applies even more forcefully in claims un-

der § 303 because these are dependent on unfair labor practice allegations, which Congress had specifically in mind in adopting the § 10(b) six month limitations period.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 84-7866

MONARCH LONG BEACH CORP.

v.

SOFT DRINK WORKERS, LOCAL 812, et al.

Argued Feb. 28, 1985

Decided May 20, 1985

Before KAUFMAN, OAKES, and MESKILL, Circuit Judges.

OPINION OF THE COURT

MESKILL, Circuit Judge: — This is an appeal from a judgment entered in the United States District Court for the Eastern District of New York, Wexler, J., dismissing both counts of Monarch Long Beach Corporation's (Monarch) complaint against Soft Drink Workers, Local 812, International Brotherhood of Teamsters, and the President and Secretary-Treasurer of Local 812 (collectively Local 812 or the union). Both counts sought damages for alleged injuries to Monarch's business resulting from the secondary boycott activities of the union. Relying on DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the district court dismissed count one, a claim under section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187 (1982),

as untimely filed. The court dismissed the second count, a pendent state claim, on federal preemption grounds.

We believe that the district court's application of Del-Costello was incorrect and that count one was timely filed and should not have been dismissed. The district court correctly concluded that Monarch's state law claim was preempted by federal law.

BACKGROUND

Local 812 is a labor organization that represents primarily workers employed by soft drink manufacturers in the New York City metropolitan area. In 1977 and 1978, due at least in part to the high costs of doing business in and around New York City, a number of soft drink manufacturers in Local 812's jurisdiction suffered precipitous declines in business. As a result, many Local 812 members lost their jobs. A survey conducted by the union revealed that a substantial number of area retailers purchased their soft drink products from outside of Local 812's territory.

Monarch, a retailer and wholesaler of beer and soda located in Local 812's jurisdiction, at all times relevant to this litigation purchased most of its soda from non-local manufacturers. On March 27, 1978, Local 812 began to picket and distribute handbills at Monarch's retail outlet. Union members urged customers to buy only locally produced soft drinks from Monarch.

On April 7, 1978, Monarch filed an unfair labor practice charge against Local 812. The National Labor Relations Board (NLRB or Board) issued a complaint against the union for engaging in prohibited secondary boycott activities in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4)(ii)(B) (1982). The Board's petition for a section 10(1), 29 U.S.C. § 160(1) (1982, injunction was denied by the United States District Court for the East-

ern District of New York on May 30. The picketing continued through June 1978, while hearings were being held before the NLRB administrative law judge (ALJ). Picketing finally ended on August 25, 1978, when the New York Supreme Court, at Monarch's request, issued a preliminary injunction.[1]

The ALJ decided against Local 812 in March 1979. The Board affirmed the ALJ's findings and conclusions and issued a cease and desist order against the union. Local 812 appealed to the D.C. Court of Appeals.[2] That court affirmed the Board's decision and granted the Board's cross-application for enforcement. Soft Drink Workers Union Local 812 v. NLRB, 657 F.2d 1252 (D.C. Cir. 1980).

Monarch filed this action in the federal district court for the Eastern District of New York on August 25, 1981—exactly three years from the date on which the picketing ended. The district court dismissed Monarch's complaint on September 21, 1984.

DISCUSSION

A. *Count One—The Section 303 Claim*

Seeking reparation for economic harm allegedly caused by Local 812's unlawful conduct, Monarch's federal cause of action stated a claim for damages under section 303 of the LMRA. That provision confers upon any person

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[1] Monarch sued Local 812 in state court seeking damages and injunctive relief. The suit was removed to federal court and then remanded to state court. That litigation, including Monarch's November 1984 motion to amend the complaint to add a federal section 303 claim, is still pending. The state law claim was identical to the pendent claim alleged in the suit before us.

[2] Section 10(f) of the NLRA, 29 U.S.C. § 160(f) (1982), permits any person aggrieved by a final order of the Board to obtain review in the court of appeals in which the unfair labor practice was committed or in the Court of Appeals for the District of Columbia.

"injured in his business or property" as a result of secondary boycott activities—conduct deemed unlawful for the limited purpose of the provision—a right of action to "recover the damages by him sustained and the cost of the suit." Section 303 contains no limitation period.

When Congress creates a federal cause of action but does not expressly provide an applicable statute of limitations, we assume that Congress intended the courts to adopt the limitation period of an analogous cause of action. Ordinarily, courts have drawn a rule from state law, Johnson v. Railway Express Agency, 421 U.S. 454, 462-65, (1975); UAW v. Hoosier Cardinal Corp., 338 U.S. 696, 703-04 (1966), and "resort to state law remains the norm for borrowing of limitations periods." DelCostello, 462 U.S. at 171. But where the application of a state statute of limitations would "frustrate or interfere with the implementation of national policies" or "be inconsistent with the underlying policies of the federal statute," courts should borrow a timeliness rule from federal law. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977); Wilson v. Garcia, 53 LW 4481, 4482 & n.12 (U.S. Apr. 17, 1985).

Examining this practice within the specialized realm of labor law, the Supreme Court in DelCostello explained that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, [courts should] not hesitate[] to turn away from state law." 462 U.S. at 172. The issue before the DelCostello Court was what limitations period to apply to a hybrid section 301/duty of fair representation suit brought by an employee against an employer under section 301 of the LMRA, 29 U.S.C. § 185 (1982), for breach of the collective bargaining agreement and against a union for breach of its duty of fair representation. The Court con-

cluded that ordinary state law provided no adequate analogy to the hybrid suit and thus it turned to federal law to find an appropriate statute of limitations.

Guided by a number of related concerns, the DelCostello Court adopted the six month period for filing unfair labor charges with the NLRB contained in section 10(b) of the NLRA, 29 U.S.C. § 160(b). Noting the close analogy, indeed occasional overlap, of unfair labor practices on the one hand and, on the other hand, a union's breach of its duty of fair representation and an employer's breach of a collective bargaining agreement, the Court explained that the section 10(b) limitation period was "actually designed to accommodate a balance of interests very similar to that at stake" in a hybrid suit. 462 U.S.C. at 169. Those interests, which could not properly be served by state law included the effectuation of the purposes and policies of the federal labor laws, particularly the maintenance of industrial peace and the rapid resolution of labor disputes, and the need for national uniformity in the regulation of labor relations.

In this case, the district court assumed that because the section 303 cause of action involves an unfair labor practice, "the rationale for applying the six month statute of limitations for charges of unfair labor practices before the National Labor Relations Board is at least as strong here as it was in DelCostello." 593 F.Supp. at 385. Taking this approach one step further, Local 812 urges that the need for prompt resolution and national uniformity is even greater in the context of section 303 suits than in the context of hybrid section 301/duty of fair representation suits. We cannot accept this reasoning. We believe that the DelCostello analysis compels us in the context of a section 303 suit to adhere to the general rule and turn to state law to find an appropriate statute of limitations.

The policy considerations that influenced the DelCostello Court were rooted in the facilitation and protection

of "those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 42 U.S. at 162-63 (quoting UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966))). Section 303 suits simply do not implicate the same concerns. Although it depends on the commission of an unfair labor practice by the union, specifically a secondary boycott, the section 303 cause of action involves parties who are otherwise completely unrelated. The dispute upon which liability is predicated is not a collective bargaining dispute; it does not arise within the context of a labor-management relationship. Labor peace will not be disrupted if section 303 suits are not rapidly resolved.

The DelCostello Court itself cautioned that its holding "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere," that it should not be interpreted "to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy." 462 U.S. at 171. Thus the Court's own language supports our conclusion that DelCostello should be narrowly construed. The particularized circumstances of the hybrid section 301/duty of fair representation suit, which inevitably involve an immediate and direct impact on labor-management relations, demarcate the limits of DelCostello's reach. O'Hare v. General Marine Transport Corp., 740 F.2d 160, 167-68, (2d Cir. 1984), cert. denied, 53 LW 3597 (U.S. Feb. 19, 1985); see also Adams v. Gould Inc., 739 F.2d 858, 866-67 (3d 1984).

In accordance with the general rule, therefore, we turn to state law for a section 303 analogue from which to borrow a limitations period. The nature of the section 303 cause of action is easily discernible from the face of the statute. It is an action to recover injuries to one's business or to one's property caused by a specific

type of tortious conduct. The disjunctive enumeration of these compensable harms evidences Congress' intent that the two be treated as separate wrongs. It is reasonable to assume, therefore, that they should be considered separately for purposes of identifying an appropriate limitations period. Cf. Wilson v. Garcia, 53 LW at 4483-85 (the nature of 42 U.S.C. § 1983 requires that all claims brought pursuant thereto be characterized in the same way for statute of limitations purposes).

Monarch seeks damages for alleged injury to its business caused by Local 812's picketing. It alleged no injury to property. The most suitable state law analogue, therefore, is New York's cause of action for damages to one's business caused by actions in restraint of trade, N.Y. Gen. Bus. Law § 340 (McKinney 1968 & Supp. 1984), which has a four year statute of limitations. Thus, even if we assume that the four years began to run on the first day of picketing, March 27, 1978, this action, filed on August 25, 1981, was timely. Therefore, we reverse the district court's dismissal of count one.

B. *Count Two—The Pendent State Claim*

Based on precisely the same facts as count one, count two alleged that Local 812 intentionally interfered with Monarch's operation, seeking to effect an embargo in contravention of New York law and policy, and that as a result Monarch's business was harmed. Except for a claim for punitive damages, count two is merely a state law version of a section 303 claim. Settled precedent overwhelmingly supports Local 812's argument that the cause of action stated in count two, including the punitive damages claim, is preempted by federal labor law.

Addressing this same issue in Local 20, Teamsters v. Morton, 377 U.S. 252, 261 (1964), the Supreme Court explained that "state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities." The Court also held that the pre-

emptive effects of section 303 extended to punitive damages. Id. at 260-61. More than ten years after Morton, we echoed its holding and affirmed the dismissal of a state law claim virtually identical to Monarch's. Iodice v. Calabrese, 512 F.2d 383, 390 (2d Cir. 1975).

The dismissal of count one, Monarch's section 303 claim, is reversed and that count is remanded to the district court for trial. The dismissal of count two, Monarch's pendent state claim, is affirmed. The parties shall bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV 81-2760

MONARCH LONG BEACH CORP.,
Plaintiff,

-against-

SOFT DRINK WORKERS, etc.,
Defendants.

September 21, 1984.

MEMORANDUM AND ORDER

LEONARD D. WEXLER, District Judge

In this action plaintiff sues the defendant union for damages allegedly sustained by plaintiff in consequence of defendant's picketing activities against plaintiff. Defendant picketed plaintiff's place of business, urging prospective customers to buy only locally produced soft drinks from plaintiff and not to buy other soft drinks from plaintiff. Count I of the complaint charges defendant with an unfair labor practice under 29 U.S.C. Section 158(b)(4), and hence with a violation of 29 U.S.C. Section 187. Count II charges defendant with a violation of New York common law regarding embargo. Defendant has moved to dismiss.

Defendant contends that Count I is time-barred under *DelCostello v. International Broth. of Teamsters*, 103 S.Ct. 2281 (1983). There, the Supreme Court estab-

lished a six month limitation for an action against an employer for breach of a collective bargaining agreement and against a union for breach of the duty of fair representation by mishandling the ensuing arbitration. The limitation was borrowed by the Supreme Court from the limitation for bringing charges of unfair labor practices before the National Labor Relations Board.

In the instant case, defendant's activities have been found to constitute an unfair labor practice. The United States Court of Appeals for the District of Columbia Circuit made this finding in affirming a National Labor Relations Board cease and desist order directed against defendant's activities. *Soft Drink Workers Union Local 812 v. N.L.R.B.*, 657 F.2d 1252 (D.C. Cir. 1980). Since Defendant's activities have unequivocally been found to constitute an unfair labor practice, the rationale for applying the six month statute of limitations for charges of unfair labor practices before the National Labor Relations Board is at least as strong here as it was in *DelCostello*.

Other courts have applied a six month limitation to actions brought under 29 U.S.C. Section 187. In *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union* No. 521, No. 80-2210-M (W.D. Tenn. Feb. 24, 1983), the court applied such a limitation. On April 8, 1983, however, the court reversed its own decision. The court noted that on February 24, 1983, the Sixth Circuit had decided in *Pitts v. Frito-Lay, Inc.*, 700 F.2d 330 (6th Cir. 1983), that the Sixth Circuit's earlier decision in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982) (establishing six month statute of limitations for suit against employer for breach of collective bargaining agreement and against union for breach of duty of fair representation), should not be applied retroactively. The court (W.D. Tenn.) therefore held that a six month limitation would not be applied to suits under 29 U.S.C. Section 187 arising prior to the *Badon* decision, and declined

to discuss whether such a limitation would apply to later suits under 29 U.S.C. Section 187.

In *Malcolm Boring Co., Inc. v. International Union of Operating Engineers, Local Union No. 12*, No. CV 80-5688 (C.D. Cal. Aug. 19, 1983), the court ruled that a six month statute of limitation should be applied to suits under 29 U.S.C. Section 187.

If *DelCostello* mandates a six month limitation for suits under 29 U.S.C. Section 187, we see no reason why such a limitation should not be applied retroactively to suits filed before *DelCostello* was decided. In *DelCostello* itself, the Court did not hesitate to apply a limitation it had only just then announced. In *Assad v. Mount Sinai Hosp.*, 725 F.2d 837 (2d Cir. 1983), the Second Circuit applied *DelCostello* retroactively to a suit against an employer for wrongful discharge and against a union for breach of the duty of fair representation.

Although there is some authority for the proposition that *DelCostello* is restricted in application to hybrid suits against both an employer and a union, *Gordon v. Winpisinger*, 581 F. Supp. 234 (E.D.N.Y. 1984), we respectfully disagree and believe that *DelCostello* is not by its terms so restricted.[1]

For the above reasons, we hold that under *DelCostello* the instant Count I is barred by a six month statute of limitations.

We find that Count II of the complaint is preempted by federal law. State law is ordinarily preempted when the conduct in question is even arguably prohibited or protected by federal labor law. *Local 926, Intern. Union of Oper. Eng. v. Jones*, 103 S.Ct. 1453, 1458-59 (1983). In the instant case, the conduct in question is not only

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[1] *See Federation of Westinghouse Independent Salaried Unions v. Westinghouse Electric Corp.*, 53 Law Week 2011 (3d Cir. June 12, 1984).

"arguably prohibited" but has in fact been found to constitute an unfair labor practice. *Soft Drink Workers Union Local 812 v. N.L.R.B., supra.* Although the preemption doctrine does not apply when the conduct in question is only a peripheral concern of federal labor law or touches on interests deeply rooted in local feeling and responsibility, *Local 926, Intern. Union of Oper. Eng. v. Jones,* 103 S.Ct. 1453, 1459 (1983), we find that these exceptions to the preemption doctrine are not applicable to the instant case. It is interesting to note that, in a similar case, the Appellate Division of the New York Supreme Court, while finding that state law was not preempted, warned that "if this were an unfair labor practice case" preemption would be applicable. *Barclay's Ice Cream Co. v. Local No. 757,* 51 A.D. 2d 516, 378 N.Y.S. 2d 395 (1976), *affd,* 41 N.Y. 2d 269, 392 N.Y.S. 2d 278 (1977) (holding that conduct in question was not arguably subject to federal labor law), *cert. denied,* 436 U.S. 925 (1978). Since a federal court has now found that the conduct involved in this case constitutes an unfair labor practice, we believe that a New York state court would decline to follow *Barclay's* today. In any event, we find that federal law preempts Count II of the complaint.

Count I of the complaint is dismissed on the ground that it is time-barred. Count II of the complaint is dismissed on the ground that it is preempted by federal law. The plaintiff shall have no relief. The Clerk shall enter judgment in favor of the defendant and against the plaintiff.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV 81-2760

MONARCH LONG BEACH CORP.,
Plaintiff,

v.

SOFT DRINK WORKERS, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS: DAVID LEVINGER, AS PRESIDENT OF SAID LOCAL UNION: ANTHONY VINCI, AS SECRETARY-TREASURE OF SAID LOCAL UNION,
Defendants.

JUDGMENT

A memorandum and order of the honorable Leonard D. Wexler United States District Judge, having been filed on September 26, 1984, dismissing Count 1 of the complaint on the ground that it is time-barred, dismissing Count 2 of the complaint on the ground that it is pre-empted by Federal law, directing the clerk to enter judgment in favor of the defendant and against the plaintiff, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; that Count 1 of the complaint is dismissed on the ground that it is time-barred; that Count 2 of the complaint is dismissed on the ground that it is preempted by Federal law; that the plaintiff shall

have no relief; and that judgment is entered in favor of the defendants and against the plaintiff.

Dated: Uniondale, New York
September 26, 1984

ROBERT C. HEINEMANN
Clerk of Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy-In-Charge

APPENDIX D

This case involves §§ 8(b)(4) and 10(b) of the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449 as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136 ("LMRA"), and the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 ("LMRDA"), and § 303 of the LMRA as amended by the LMRDA.

Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), provides as follows:

Section 8(b): It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representa-

tive of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as

long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 10(b) of the NLRA, 29 U.S.C. § 160(b), provides in pertinent part as follows:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * *

Section 303 of the LMRA, 29 U.S.C. § 187, provides as follows:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.